

1 THE HONORABLE THOMAS S. ZILLY  
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10 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

11 REX – REAL ESTATE EXCHANGE, INC.,

Case No. 2:21-cv-00312-TSZ

12 Plaintiff,

**OPPOSITION TO ZILLOW'S  
MOTION FOR SUMMARY  
JUDGMENT**

13 v.

14 ZILLOW, INC., et al.

NOTE ON MOTION CALENDAR:  
July 14, 2023

15 Defendants.

16 ORAL ARGUMENT REQUESTED

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## **INTRODUCTION**

In January 2021, Zillow agreed with NAR to segregate and demote the listings of non-NAR affiliated brokers, such as REX, which do not abide by NAR rules. It did so by implementing a two-tab search results page, designed specifically to comply with NAR's Segregation Rule, as part of an initiative it dubbed, "Project Bookshelf." Project Bookshelf turned on the lights, not for consumers, but for NAR and MLS members. The new layout separated MLS listings and non-MLS listings by defaulting to MLS listings.

In its summary judgment motion, Zillow baldly proclaims: “Over two years of litigation confirms that Zillow’s decision to join Multiple Listing Services (“MLSS”) around the country … was an independent business decision.” To the contrary, the record shows that Zillow implemented its two-tab display to comply with and enforce NAR’s Segregation Rule pursuant to an agreement with NAR which, at trial, REX will prove was anticompetitive and caused REX to fail.

The Court should deny Zillow’s motion because the evidentiary record establishes both that Zillow entered into an anticompetitive agreement with NAR to implement and enforce NAR’s Segregation Rule in violation of Section 1 of the Sherman Act and also that the two-tab display violated the Lanham Act. At a minimum, the material facts adduced in discovery with respect to each element of REX’s claims are genuinely in dispute.

## BACKGROUND

Zillow proffers “Background” but does not claim the recited “facts” are undisputed or demonstrate the absence of a genuine issue of material fact. The material facts below are either undisputed and entitle REX to summary judgment or in dispute:

1. NAR is the nation's largest trade association. It has more than 1.45 million members organized into local, state and territory associations.<sup>1</sup> NAR's members serve on

<sup>1</sup> <https://www.nar.realtor/newsroom/nar-fact-sheet>

1 national committees that promulgate policies and rules that govern REALTORS® in the  
 2 conduct of their business. Evans ¶ 18.<sup>2</sup>

3       2. NAR members own or control Multiple Listing Services (“NAR MLSs”)  
 4 which receive and compile residential real estate listings in their respective territories. The  
 5 listings are submitted by NAR members and can be published or displayed only by “MLS  
 6 Participants.” Evans ¶¶ 18-21, 34.

7       3. NAR MLSs and their participating REALTORS® have monopoly power in  
 8 their local markets over real estate brokerage services. Evans ¶ 297. NAR has monopoly  
 9 power over the national market for real estate brokerage services. *Id.*

10     4. NAR publishes a Handbook on Multiple Listing Policy which contains  
 11 policies, rules and model rules and bylaws, proposed by NAR committees, and adopted by  
 12 the NAR’s Board of Directors, and applicable to MLSs and MLS Participants. *See, e.g.*, Ex.  
 13 1, NAR0001650 (NAR 2021 Handbook on Multiple Listing Policy)<sup>3</sup>

14     5. NAR members are licensed to use NAR’s trademarks, including the  
 15 REALTOR® logo, and MLSs are entitled to use the NAR MLS logo provided they comply  
 16 with NAR’s policies. *Id.* at ‘681. If a NAR MLS fails to do so, NAR can revoke its charter  
 17 and terminate its insurance coverage.<sup>4</sup>

18     6. Pursuant to Section G of the Handbook, NAR members submitting listings to  
 19 MLSs are required to comply with the Buyer Broker Commission rule (“BBCR”) which  
 20 requires that all listings be accompanied by non-negotiable offers of compensation to buyer  
 21 agents. *Id.* at ‘701-702.

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22  
 23     <sup>2</sup> References to “Evans \_\_\_\_” are to REX expert David Evans’s opening report. Evans’s reply  
 24 report will be cited as “Evans Reply \_\_\_\_.”

25     <sup>3</sup> Note: Numbered exhibits refer to exhibits previously filed in support of REX’s Motion for  
 26 Summary Judgment, Dkt. 332; Lettered exhibits refer to exhibits attached to the Declaration  
 27 of Carl Goldfarb filed concurrently with the present motion.

28     <sup>4</sup> <https://www.nar.realtor/about-nar/policies/charter-revocation-procedure> (“NAR’s Bylaws  
 prohibit state and local associations from adopting any rule, regulation, practice or policy  
 inconsistent with, or contrary to, any policy adopted by the NAR Board of Directors.”); Ex.  
 WW NAR0447581 (NAR requiring certification of compliance in order to maintain  
 insurance coverage).

1       7. While sellers can offer any amount of compensation to buyer-agents under  
 2 the BBCR, seller-agents often instruct their clients that they need to offer commissions at  
 3 the highest rate in their communities to induce buyer-agents to bring clients who may be  
 4 interested in their homes.<sup>5</sup> The BBCR thus artificially inflates commission rates to supra-  
 5 competitive levels.

6       8. In 2001, NAR formulated and promulgated its IDX policies and rules, which  
 7 govern the electronic display of listings by MLS Participants. “IDX” is an acronym for  
 8 Internet Data Exchange.” *Id.* at ‘688-689.

9       9. NAR members can display IDX-compliant listings if they qualify as “MLS  
 10 Participants.” MLS Participants agree to abide by NAR’s IDX policies and model rules and  
 11 to “actively endeavor.” MLS Participants “actively endeavor” when they make non-  
 12 negotiable offers of compensation to buyer-brokers as required by the BBCR. *Id.* at ‘688.

13      10. The Segregation Rule, Model Rule 18.3.11, is an optional rule that is part of  
 14 NAR’s IDX policies and model rules. *Id.* at ‘750, ‘798. It has been adopted by 71% of NAR  
 15 MLSs. Ex. 12 – at response to Interrogatory No. 4.

16      11. NAR promulgated the Segregation Rule in 2001 and amended it in 2014. Ex.  
 17 XX, NAR0001114 at ‘117-‘118; Ex. YY NAR0000937 at ‘939. The Segregation Rule as  
 18 amended requires separating MLS and non-MLS listings. It states: “Listings obtained  
 19 through IDX feeds from REALTOR® Association MLSs where the MLS participant holds  
 20 participatory rights must be displayed separately from listings obtained from other sources.”  
 21 Ex. 1 at ‘750, ‘798.

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 24      5 <https://www.nar.realtor/blogs/culture-scan/how-to-answer-the-commission-question> (“In the end, every time you cut your commission you are throwing away profit. That profit could be used to reinvest into your business and/or bolster your children’s college savings fund. Every time you accept less, you say to yourself you aren’t worth the money. This will eventually cripple your belief system. So the next time a buyer or a seller tries to negotiate your commission, what will you say? Really you only have two choices. You can demonstrate the value of what you can do for your client, or you can sacrifice your future and self-esteem by accepting less than you deserve.”)

1       12. The Segregation Rule also expressly incorporates and includes the  
 2 Comingling Rule, 18.2.10, which permits a participant to commingle only MLS data, and so  
 3 prohibits an MLS from barring the comingling of such data. *Id.* at ‘749, ‘797.

4       13. Zillow wears two hats; it is a broker, and also an aggregator of residential real  
 5 estate listings that it makes available to consumers on the internet without charge. As an  
 6 aggregator, Zillow competes with Realtor.com, Redfin, and other platforms. Zillow’s  
 7 platforms are used by about two-thirds of home buyers to search for homes,<sup>6</sup> followed at a  
 8 substantial distance by Realtor.com, which is currently operating under a NAR license, with  
 9 about a 20.2% share of views and Redfin (a NAR member) with about a 13.4% market share.  
 10 Evans ¶ 249, Table IV-1. Both Realtor.com and Redfin effectively prohibited REX from  
 11 listing its homes on their platforms.

12       14. Zillow also operates Premier Agent and Premier Agent Flex programs from  
 13 which it derives significant revenue. Premier Agents are mainly buyer-brokers who pay  
 14 Zillow for advertising on its platform in exchange for leads on buyers looking to purchase  
 15 homes. Ex. 2, Samuelson Decl. ¶ 13. In the Premier Agent Flex program, brokers with  
 16 successful track records are hand-picked by Zillow to receive buyer leads in exchange for  
 17 sharing their buyer broker commissions with Zillow when a transaction closes. Ex.UUU,  
 18 ZG\_00216406 at ‘412-27.

19       15. Zillow’s revenue generating customers are thus real estate brokers and agents  
 20 who have a financial interest in maintaining excessive buyer broker commission rates.

21       16. Until January of 2021 when Zillow transitioned to IDX feeds for its listings,  
 22 Zillow obtained its listings from multiple sources through syndication feeds, broker feeds  
 23 and from individuals who wanted to sell their homes without relying on a broker (“For Sale  
 24 By Owner” or “FSBOs”). Zillow’s syndication and broker feeds were cancellable. Ex. 2,  
 25 Samuelson Decl. ¶¶ 32-33.

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<sup>6</sup> Ex.J, ZG\_00716276. Zillow also operates Trulia, which is also one of the top four real  
 estate search platforms.

1       17. Until January 2021, when Zillow transitioned to IDX feeds, Zillow displayed  
 2 all listings in a single integrated format. Ex. 2, Samuelson Decl. ¶ 38.

3       18. Before transitioning to IDX feeds, Zillow's database had national coverage  
 4 of about 98%, was highly accurate, and continually updated. Ex. 2, Samuelson Decl. ¶ 40.  
 5 Zillow's own executives did not consider listings data quality as a reason to transition to  
 6 IDX listings feeds. Ex. VVV, ZG\_00014471 [REDACTED]  
 7 [REDACTED]  
 8 [REDACTED] Ex. WWW, ZG\_00006254 at '55  
 9 [REDACTED]

10     19. REX was a licensed broker which employed salaried real estate agents in all  
 11 the states where it operated. REX had a unique business model – it offered consumers an  
 12 opportunity to sell their homes without paying buyer-broker commissions. Ex. 14,  
 13 Hendricks Dep. at 199:16–200:10; Ex. 26, ZG\_00007849 at '849; Ex. 27, ZG\_00007622 at  
 14 '623; and Ex. 28, ZG\_00094395.

15     20. Because REX did not offer buyer-broker commissions, it was not eligible for  
 16 NAR membership, and it could not qualify as a MLS Participant. Accordingly, it could not  
 17 submit its listings for display to NAR MLSs.

18     21. Zillow was the only digital listing platform that included non-MLS listings.  
 19 Evans ¶ 252. Because REX operated outside the MLS system and Zillow was the dominant  
 20 aggregator, REX relied heavily on Zillow to market its listings. Ex. ZZ, Sides Dep. 83:18–  
 21 84:1.

22     22. Until January of 2021 when Zillow transitioned to IDX listings, REX  
 23 provided its listings to Zillow via a broker feed and Zillow included REX's listings in its  
 24 database. REX also paid Zillow to participate in its Premier Agent program. Ex. ZZ Sides  
 25 Dep. at 331:16–332:5.

26     23. Beginning in 2017, Zillow began to pursue a business strategy that was  
 27 transaction-based, including buying and re-selling homes for its own account ("i-buying").  
 28 However, Zillow was concerned that the real estate brokerage industry would perceive its

1 entry into i-buying as a threat and that brokers would retaliate by cancelling listings  
 2 agreements. Ex. 15, Samuelson Dep. at 13:5-13; Ex. 2, Samuelson Decl. ¶ 52.

3       24. Zillow knew that it could protect itself from retaliatory cancellations if it  
 4 became a broker, joined NAR, and secured its listings with IDX feeds, but Zillow also knew  
 5 that would require submitting to NAR's IDX policies and rules as adopted by the NAR  
 6 MLSs. Ex. 2, Samuelson Decl. ¶ 63; MPSJ Ex. 21, ZG\_00002362.

7       25. Because Zillow maintains a national platform, Zillow could not comply with  
 8 NAR's IDX policies and model rules without complying with the Segregation Rule.

9       26. Over a period of at least 2 years, Zillow secretly re-engineered its display to  
 10 conform to the Segregation Rule. It created a new display that defaulted to MLS listings and  
 11 had two tabs – one labelled “Agent Listings” and the other labelled “Other Listings.” Ex.  
 12 - Hendricks Dep. Ex. 12 (screenshot of new Zillow search results page with two tabs).  
 13 The “Agent Listings” tab appeared first and was highlighted in blue, while the “Other  
 14 Listings” tab was second and appeared against a dull white background. *Id.*

15       27. In September 2020, Zillow announced its agreement to join NAR as a  
 16 brokerage, comply with NAR's rules, and transition to IDX feeds. Ex. 15, Nov. 2022  
 17 Samuelson Tr. 13:5–13. At that time, Errol Samuelson, a Zillow Sr. V.P., proclaimed to  
 18 NAR's members that Zillow would “no longer be a third party” and that Zillow would be  
 19 “locking arms” and working “shoulder to shoulder” with them.<sup>7</sup>

20       28. Zillow went live with its new display in mid-January 2021. Ex. XXX,  
 21 ZG\_00017855. Before going live, Zillow and the MLSs consulted with NAR regarding  
 22 Zillow's compliance with the IDX policies and rules. Ex. 22, NAR0030935; Ex. 23,  
 23 NAR0092942.

24       29. The labels employed in the two-tab display were false and misleading  
 25 because not all agent listings, but exclusively MLS agent listings were under the “Agent

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 28       7 <https://www.youtube.com/watch?v=EMidklRVFMM> at 00:20

1 Listings” tab, while the “Other Listings” tab included REX’s listings despite REX’s status  
 2 as a licensed broker employing fully licensed agents.

3       30.     But for the Segregation Rule, Zillow would not have implemented its new  
 4 display. Ex. 36 - ZG\_00567367 [REDACTED]  
 5 [REDACTED]

6 [REDACTED] . Ex. TTT, ZG\_00016887.

7       31.     After implementing its new display, Zillow unsuccessfully petitioned NAR –  
 8 not the MLSs – at least twice to replace the Segregation Rule with a rule that would permit  
 9 an MLS participant to commingle all listings from all sources. Ex. 36, ZG\_00567367.

10      32.     Until Zillow’s display change, REX experienced rapid growth. Between 2016  
 11 and 2019, its average annual growth measured in closings was 227% and its average annual  
 12 revenue growth in the same time period was 293%. Evans ¶¶ 382-383. REX also performed  
 13 at or above its growth forecasts in the first quarter of 2020 and even in the last three quarters  
 14 of 2020 when the pandemic’s effects were most intense, REX’s revenue increased by 60%.  
 15 Evans ¶¶ 387, 399.

16      33.     In August 2020, REX closed an arm’s-length market transaction that valued  
 17 REX at \$325 million. Evans ¶ 541 and Table VIII-9.

18      34.     During 2020, REX entered discussions with Bank of America and Wells  
 19 Fargo, regarding a public offering. *See* Ex. HH, REX\_0000973; Ex. II, REX\_0627520. They  
 20 valued REX’s enterprise value in October 2020 between \$751 million and \$1.225 billion.  
 21 Evans ¶¶ 364, 403, 425.

22      35.     In 2019 REX co-listed properties on a very limited basis in an attempt to get  
 23 greater visibility for properties that were not selling. From June 2019 to March 2020, REX  
 24 co-listed 54 homes, or 2.5% of REX’s new listings. In the last three quarters of 2020, when  
 25 the pandemic deterred buyers from attending open houses, REX increased its co-listings to  
 26 14% of new listings. Evans Reply ¶ 66.

27      36.     REX increased its co-listings more after Zillow implemented its  
 28 new display. By that time viewings of FSBO listings and, by inference REX listings, had

1 declined 70-85%, and, as a result, REX was having difficulty selling listed homes and  
 2 attracting new listings. Evans Reply ¶ 67.

3       37. About three quarters of all REX's co-listings were made after its listings were  
 4 segregated by Zillow. Evans Reply ¶ 67.

5       38. REX was unable to mitigate the harm from the segregation of its listings by  
 6 co-listing. An analysis of Zillow's data found the change to the two-tab display was  
 7 accompanied by a 64.6 percent reduction in page views of REX's listings and caused a  
 8 60.2% drop in REX closings in 2021 and 75.5% drop in 2022, leading to REX's demise.  
 9 Evans ¶¶ 416, 423.

## ARGUMENT

### I. Legal Standard

12       Summary judgment is only appropriate if the moving party "shows there is no  
 13 genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). The moving party must show  
 14 that "under the governing law, there can be but one reasonable conclusion as to the verdict."  
 15 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Summary judgment for the  
 16 moving party is proper when a "rational trier of fact" would not be able to find for the non-  
 17 moving party based on the record taken as a whole. *Matsushita Elec. Indus. Co. v. Zenith*  
 18 *Radio Corp.*, 475 U.S. 574, 587 (1986).

### II. REX Has Direct and Circumstantial Evidence of an Agreement, Combination, or Conspiracy in Violation of the Sherman Act

21       Zillow's argument for summary judgment on REX's Sherman Act, Section 1 claim  
 22 largely overlaps with NAR's argument for summary judgment. REX demonstrated in its  
 23 opposition to NAR's motion that the record contains undisputed direct evidence that Zillow  
 24 entered into an anticompetitive agreement with NAR to enforce the Segregation Rule to gain  
 25 access to listings from IDX feeds. *See* REX's opposition to NAR's motion for summary  
 26 judgment, at 8. REX also pointed to circumstantial evidence of an anticompetitive  
 27 agreement between Zillow and NAR, including by showing that Zillow was acting against  
 28 its unilateral self-interest. *See id.* at 14. In response to NAR's contention, that REX did not

1 establish antitrust impact, REX further demonstrated that there was both direct and indirect  
 2 evidence of anticompetitive impact. *See id.* at 20. Those sections of REX's opposition to  
 3 NAR's motion are incorporated herein by reference. Insofar as Zillow raises additional  
 4 arguments, REX provides the following response.

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**A. The Evidence Is Disputed That Zillow Acted Independently and  
 Consistent with a Proper Business Purpose**

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Zillow cannot credibly claim that it acted for a proper business purpose when it  
 joined NAR and adopted the Segregation Rule because the record is replete with admissions  
 by Zillow employees that they knew the Segregation Rule was anti-consumer and anti-  
 competitive. [REDACTED]

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[REDACTED]<sup>8</sup> Another Zillow executive said: [REDACTED]

[REDACTED] [REDACTED]<sup>9</sup> Other Zillow executives also thought the rule was anti-consumer and anti-competitive.

The record also shows Zillow knew REX was a disruptor. As one Zillow employee

said: [REDACTED]

[REDACTED] Ex. 27,  
 ZG\_00007622 at '623. Another said: [REDACTED]

[REDACTED] Ex. AAA,  
 ZG\_00008914. And two Zillow executives knew the Rule would destroy REX and other  
 non-MLS brokers. Ex. I [REDACTED]

[REDACTED]; Ex. CCC ZG\_00008570 [REDACTED]

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<sup>8</sup> Ex.BBB Samuelson Dep., April 27, 2023, at 55:11-14; Ex. I, ZG\_00008197; Ex.CCC, ZG\_00008570.

<sup>9</sup> Ex.DDD, ZG\_00351924; Ex.EEE, ZG\_00007925; Ex. FFF, ZG\_00352138; Ex.GGG, ZG\_00002661; Ex.HHH, Hendricks Dep., April 5, 2023, at 151:16-152:2.

1 [REDACTED]. But Zillow agreed to enforce the Segregation Rule anyway because it wanted IDX  
 2 feeds and the only way it could get them was by joining NAR and enforcing the rule.

3       Zillow’s decision to join an anticompetitive conspiracy knowing that it would  
 4 preclude competition, including from disruptors, because it would profit Zillow both as a  
 5 broker and as an aggregator cannot possibly constitute a proper business purpose without  
 6 gutting the Sherman Act. *PLS.Com, LLC v. Nat'l Ass'n of Realtors*, 32 F.4th 824, 836 (9th  
 7 Cir. 2022), *cert. denied sub nom. The Nat'l Ass'n of Realtors v. The PLS.com, LLC.*, 143 S.  
 8 Ct. 567 (2023); *see also Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, 803 F.3d 1084,  
 9 1089 (9th Cir. 2015) (in circumstantial evidence case, if defendant provides “a plausible and  
 10 justifiable reason for its conduct that is consistent with proper business practice” burden  
 11 shifts to plaintiff “to provide specific evidence tending to show that the defendant was not  
 12 engaging in permissible competitive behavior”).

13       Remarkably, Zillow’s argument is nearly identical in substance to the argument  
 14 recently advanced by NAR in the *PLS* case. There, the Ninth Circuit considered whether  
 15 NAR and certain of its MLSs violated the Sherman Act by adopting and enforcing a NAR  
 16 policy – the Clear Cooperation Policy – against PLS, a competitor. The Clear Cooperation  
 17 Policy generally requires a REALTOR® to submit a listing to its MLS within 24 hours of  
 18 listing a property on any website other than a brokerage’s own web site. NAR adopted the  
 19 policy because its MLSs were facing increased competition from “off-MLS” listing services.

20       NAR contended in *PLS* the Clear Cooperation Policy was procompetitive because  
 21 it reduced “search and transaction costs.” A unanimous panel of the Ninth Circuit roundly  
 22 rejected the argument stating:

23       Finally, Defendants argue that the Clear Cooperation Policy is  
 24 procompetitive because it “reduc[es] search and transaction costs.” Although this contention is dressed up in the language of economics, at its  
 25 core it is just an argument that the Clear Cooperation Policy benefits buyers’  
 26 agents because it allows them to see more listings on the MLSs and to avoid  
 27 the need to consult competing services. This is not a procompetitive  
 28 justification because it does not explain how the Clear Cooperation Policy  
 enhances competition. At bottom, Defendants argue that the Clear  
 Cooperation Policy results in a higher quality product: a listing service with  
 all of the publicly available listings in one place. But justifying a restraint

1 on competition based on an assumption it will improve a product's quality  
 2 "is nothing less than a frontal assault on the basic policy of the *Sherman*  
 3 *Act.*" *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 695 (1978).

4 *PLS.Com, LLC*, 32 F.4th at 836. Of course, that is largely what Zillow is saying here: that  
 5 joining an anticompetitive agreement because it will enable Zillow to produce a better  
 6 product constitutes a proper business purpose. Again, the Ninth Circuit's response in its  
 7 *PLS* opinion, that a defendant cannot justify its anticompetitive conduct that deprives  
 8 consumers of a choice by saying it is good consumers, is instructive:

9 The antitrust laws assume that competition will produce not only lower  
 10 prices, but also better goods and services. If Defendants are correct that  
 11 buyers' agents prefer listing networks that offer more listings in one place,  
 12 the MLSs should be in a good position to compete with upstarts like PLS.  
 13 But the fact that PLS was growing rapidly despite the MLSs' larger  
 14 inventory of listings might suggest that PLS offered features that at least  
 15 some buyers' agents found attractive, despite the lower concentration of  
 16 listings. In the end, sparing consumers the need to patronize competing  
 17 firms is not a procompetitive justification for a group boycott.

18 *PLS.Com, LLC*, 32 F.4th at 836-37 (internal citations and quotation marks omitted).

19 The Ninth Circuit's decision makes clear that Zillow's claim that its conduct was  
 20 consistent with a proper business purpose fails as a matter of law.

#### 21       B.     On Balance, Switching to IDX Feeds for Listing Data Was "A Wash"

22       Zillow's contention that it switched to IDX fees to get better listing data also fails  
 23 because the facts are disputed. The evidence is that Zillow had superior national listing  
 24 coverage long before it switched to IDX fees, and that switching to IDX feeds was "a  
 25 wash" at best.

26       REX disputes that the Zillow database was "flawed" until it secured listings via IDX.  
 27 In an email dated October 20, 2018, when Zillow's executives were fretting over competition  
 28 from Redfin, Beardsley, the Zillow V.P. quoted above, noted that Zillow had attained 98%  
 29 national coverage relying on a combination of broker and syndication feeds. [REDACTED]

[REDACTED]

[REDACTED]

30 Ex. III,  
 31 ZG\_00429485 at '487. Zillow also ignores a contemporaneous Zillow document in which

1

2

3 Importantly, the database's quality was good enough for Zillow to tout in its Annual  
 4 SEC filings its "inimitable database of homes." In its 10Ks until 2021, Zillow reported in  
 5 relevant part:

6 Our living database is the result of years of substantial investment,  
 7 sophisticated economic and statistical analysis, complex data aggregation  
 8 and millions of user contributions.... Applying extensive computer  
 9 analytics to the data, we transform it into information that is accessible,  
 10 understandable and useful... We refer to the database as 'living' because  
 the information is continually updated by the combination of our proprietary  
 algorithms, synthesis of third party data from hundreds of sources, and  
 through improvements by us and, importantly, our community of users.<sup>11</sup>

11 If there were problems with the database, Zillow never alerted the public markets.

12 To support its claim that transitioning to IDX feeds addressed flaws in the database  
 13 for the benefit of viewers, Zillow relies mainly on Samuelson's declaration and testimony,  
 14 which contradicts Samuelson's email quoted above, among others. In fact, in the same email  
 15 Samuelson stated [REDACTED]

16 [REDACTED]  
 17 [REDACTED]  
 18 [REDACTED] Ex. III, ZG\_00429485 at '487. [REDACTED]  
 19 [REDACTED]  
 20 [REDACTED]  
 21 [REDACTED]

22 Zillow also fails to acknowledge contemporaneous emails and other documents  
 23 authored by Zillow employees noting shortcomings that would accompany IDX-sourced  
 24 listings, including in some circumstances prohibitions on providing contact information for  
 25 the listing agent and featuring home values (Zestimates), requiring separate tabs for rentals

26  
 27 <sup>10</sup> Ex.JJJ, ZG 00641756 (cmt. [1]). Samuelson testified [REDACTED]  
 28 [REDACTED]. Ex.BBB, Samuelson Dep., April 27, 2023, at 161:4-163:1.

<sup>11</sup> Zillow Group, Inc., Annual Report (Form 10-K) (Feb. 15, 2018).

1 and restrictions on third party comments, and enforcing the no commingling rule. Ex. KKK,  
 2 ZG\_00226806-'809; Ex. LLL, ZG\_00016897 at '95.

3

4 **C. Zillow Switched to IDX Feeds Because It Hoped to Make More Money  
 5 from Joining the Collusive Agreement With NAR**

6 The Court also should reject Zillow's argument that it lacked a "rational economic  
 7 motivation" to conspire with NAR. Zillow is not the North Star, as Zillow likes to say,  
 8 benevolently guiding consumers to the American dream of home ownership. Rather, Zillow  
 9 has leveraged its consumer-user experience to attract advertising by buyer-agents or brokers  
 10 who Zillow, in turn, supplies with leads, the number depending on the amount of advertising  
 11 dollars that each spends. This is the Premier Agent program, which includes another  
 12 program—Premier Agent Flex—in which Zillow exacts a percentage of buyer broker  
 13 commissions earned on closed transactions by favored buyer agents or brokers.<sup>12</sup> Zillow's  
 14 revenue generating customers thus are the real estate brokers and agents (NAR members),  
 15 with an interest in maintaining excessive uniform commission rates, and Zillow's interests  
 16 are aligned with theirs. Indeed, Premier Agent, including Premier Agent Flex, are Zillow's  
 17 single most important source of revenue. Zillow, however, prefers for public relations  
 18 purposes to emphasize what it calls "turning on the lights" for consumers.

19 The record contains substantial evidence that what actually motivated Zillow to join  
 20 NAR was its financial self-interest in improving its margins in its i-buying program, Zillow  
 21 Offers (later called Zillow Homes). One way was by becoming a broker and avoiding some  
 22 or all commissions on its i-buying transactions. Ex. MMM, ZG\_00282695, at '700. Of

23

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24 <sup>12</sup> For 2017, before Zillow fully committed to Zillow Offers, its now failed i-buying  
 25 venture, Zillow reported Premier Agent revenue accounted for 71% (\$762M) of its total  
 26 revenue. Zillow Group, Inc., Annual Report (Form 10-K) (Feb. 15, 2018). Even after Zillow  
 27 pursued Zillow Offers in earnest, advertising revenue derived from industry participants  
 remained an important and large component of Zillow's business model and one of its  
 largest sources of revenue. In 2020, for example, its IMT segment generated revenue of  
 \$1.5B of which \$1.05B was attributable to the Premier Agent program alone. Zillow Group,  
 Inc., Annual Report (Form 10-K) (Feb. 12, 2021).

1 course, once Zillow began using salaried agents and brokers to buy and sell homes for  
 2 Zillow's own account through Zillow Homes—and that is precisely what Zillow declared it  
 3 would do when it announced it was joining NAR and switching to IDX feeds – Zillow would  
 4 be in direct competition with the real estate brokers who are its core customers. Zillow  
 5 expected they would retaliate by cancelling their feeds. Zillow's answer was to secretly plan  
 6 to become a broker itself, join NAR, and the MLSs and thereby secure access to IDX feeds  
 7 subject to the key condition that it conform to and enforce NAR's Segregation Rule.

8 **D. Zillow Had Significant Communications With NAR**

9 Zillow argues that it is also entitled to summary judgment because REX can produce  
 10 no evidence of communications between Zillow and NAR evidencing an agreement to  
 11 conspire. But there is no legal requirement that REX produce evidence of such written or  
 12 oral communications, and the Court should reject Zillow's argument out of hand. *See*  
 13 *PLS.Com*, 32 F.4th at 843 (quoting *Interstate Circuit v. U.S.*, 306 U.S. 208, 227 (1939))  
 14 (“Acceptance by competitors, without previous agreement, of an invitation to participate in  
 15 a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce,  
 16 is sufficient to establish an unlawful conspiracy under the Sherman Act.”)

17 Zillow also is incorrect as a matter of fact. The evidentiary record contains emails  
 18 and other documents reflecting that, between Sept 20, 2020, when Zillow announced its  
 19 intention to become a brokerage, join NAR, and switch to IDX fees and January 10, 2021,  
 20 when it implemented the new display, Zillow communicated with NAR and the NAR MLSs  
 21 regarding its new proposed display and Zillow submitted to “compliance checks” by the  
 22 NAR MLSs. Later, if a listing was wrongly placed on the Agent Listings tab, and an MLS  
 23 notified Zillow, Zillow enforced the Segregation Rule by moving the listing to the Other  
 24 Listings tab. Ex.NN, Ex.OO, Ex.PP, Ex.QQ, Ex.RR. Zillow also omits that Zillow and the  
 25 MLSs sought NAR’s “guidance” and “approval” before going forward with the IDX  
 26 transition and that when there were disputes between the MLSs and Zillow regarding  
 27 Zillow’s compliance with IDX policy, the MLSs typically deferred to NAR’s interpretations.  
 28 Ex.V, Ex.W, Ex.X, Ex.Y, Ex.Z, Ex.AA, Ex.BB, Ex.CC; Ex.DD [REDACTED]

1 [REDACTED]  
 2 [REDACTED]  
 3 [REDACTED]  
 4 [REDACTED]

### 5 III. The Segregation Rule Has a Significant Adverse Impact on Competition

6 Zillow argues (at 14-16) that REX’s Section 1 claim fails because REX must show  
 7 Defendants’ actions harmed competition, not just that they harmed REX, and that REX  
 8 cannot do so. As noted, REX demonstrated both direct and indirect evidence of impact on  
 9 competition in its response to NAR’s summary judgment motion.

10 Zillow’s contrary arguments are unavailing. Zillow’s first argument is that “in other  
 11 Section 1 contexts, an ‘arrangement’ is unlawful under the ‘rule of reason … only if its effect  
 12 is to ‘foreclose competition in a substantial share’ of the ‘relevant market.’ *Allied*  
 13 *Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 996 (9th Cir. 2010).  
 14 Zillow says a ‘substantial share’ has been quantified as foreclosure of 40% to 50% of the  
 15 relevant market,” (citing *Feitelson v. Google, Inc.*, 80 F. Supp. 3d 1019, 1030 (N.D. Cal.  
 16 2015)). Zillow fails to note that it is relying solely on *exclusive dealing cases* to create a  
 17 false requirement of 40-50% market share in order to establish the required “harm to  
 18 competition” and “anticompetitive effect.”

19 In any event, any argument that the display change did not foreclose a substantial  
 20 segment of the market is demonstrably wrong. It is undisputed that Zillow had about a 63%  
 21 share of views on aggregator apps, and Realtor.com at 20.2% and Redfin at 13.4% lagged  
 22 far behind. *See supra* at 3-4. Dr. Evans found that as a result of the Zillow’s new display,  
 23 the number of REX transactions that closed nosedived by 60.2% in 2021 and 75.5% in 2022.  
 24 Evans ¶ 423. Thus, Dr. Evans’ analysis demonstrates that REX was foreclosed, as a result  
 25 of the display change, from at least 60% of the market. That is more than enough to  
 26 demonstrate impact.

27 Zillow also argues (Mot. at 14) there was no adverse impact on competition because  
 28 REX’s listings always remained on Zillow’s website. That contention is directly contrary to

1 the Ninth Circuit's holding in *PLS.Com, LLC v. National Association of Realtors*, 32 F.4th  
 2 824 (9th Cir. 2022). The Ninth Circuit made clear that defendants' conduct does not need  
 3 to totally preclude a competitor's ability to compete to be actionable:

4 First, a group of competitors coercing a competitor's suppliers to sell to that  
 5 competitor only on "unfavorable terms" constitutes a group boycott even if  
 6 the competitors do not completely cut off the competitor's access to inputs  
 7 it needs. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209,  
 8 213, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959). That is because businesses that  
 can obtain those inputs only on unfavorable terms are unlikely to be able to  
 compete.

9 *Id.* at 835-36 (citations omitted). Zillow's contention (Mot. at 15) that there was no harm  
 10 to competition because REX could advertise on other channels is refuted by the same line  
 11 of cases on which the Ninth Circuit relied in *PLS* given Zillow's importance as an  
 12 aggregator site to any broker trying to compete outside NAR'S MLS monopoly.

13 Insofar as Zillow argues that its actions had no impact on competition because REX  
 14 could simply have co-listed with MLS agents, or because REX was too small to have an  
 15 impact, or because other discount brokers continued to operate, REX incorporates its  
 16 opposition to NAR's motion for summary judgment, at 22-23, where it addressed  
 17 comparable arguments.

18 **IV. Zillow's Motion for Summary Judgment on REX's Lanham Act Claim Should  
 19 Be Denied**

20 Zillow next argues that the Court should enter summary judgment on REX's Lanham  
 21 Act claim. However, Zillow does not dispute REX's argument that the new display with its  
 22 two tabs, "Agent Listings" and "Other Listings," is literally false (or, at least, misleading)  
 23 because REX's listings were assigned to the "Other Listings" tab when Zillow knew REX  
 24 was a licensed agent and therefore its listings qualified as "Agent Listings." Instead, Zillow  
 25 tries to dissect REX's claim, which challenges the display as a whole, arguing that the labels  
 26 that Zillow affixed to the tabs are not actionable "commercial speech."

27 Zillow's argument is pure misdirection. It rests on the erroneous proposition that the  
 28 false statement must be specifically intended to influence consumers to buy a defendant's

1 goods and services. But neither the statutory language of the Lanham Act nor Ninth Circuit  
 2 case law supports that position. The Lanham Act, by its terms, proscribes the  
 3 misrepresentation of another's goods and services "*in* commercial advertising or  
 4 promotion." 15 U.S.C. § 1125(a)(1)(B) (emphasis added). Likewise, in the Ninth Circuit  
 5 the relevant issue is whether the commercial speech *contains* a false statement. *See*  
 6 *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997) (Act requires  
 7 "false statement of fact by the defendant *in* a commercial advertisement") (emphasis added);  
 8 *see also Ariix LLC. v. Nutrisearch Corp.*, 985 F.3d 1107, 1122 (9th Cir. 2021). In this case,  
 9 the actionable false statements appeared *in* Zillow's new display that REX alleges violates  
 10 the Lanham Act, and so long as the display qualifies as "commercial speech," the false  
 11 statements are actionable.

12           **A. Zillow's Display Is "Commercial Speech"**

13           **1. Ariix Does Not Support Zillow's Argument**

14           Zillow next argues based on *Ariix* ) that its display is not "commercial speech." But  
 15 in *Ariix*, which is inapposite, the court found that the nutritional "guide" that was the subject  
 16 of the false advertising claim was ambiguous with respect to whether it proposed a  
 17 commercial transaction. Here, there is no ambiguity: Zillow's website plainly proposes the  
 18 sale of houses using brokers and agents who patronize Zillow by paying for advertising and  
 19 leads and, in the case of Premier Flex, remitting to Zillow substantial commissions.

20           Because it was not clear on its face that the nutritional guide in *Ariix* proposed a  
 21 commercial transaction, the *Ariix* court evaluated the nutritional guide using the Supreme  
 22 Court's non-dispositive *Bolger* factors (for use "where the facts present a close question")  
 23 to determine whether the guide constituted commercial speech. *Ariix*, 985 F.3d at 1115  
 24 (overruling the district court's determination that the Guide was not commercial speech)  
 25 (citing *Bolger v. Youngs Drug Prods Corp.*, 463 U.S. 60, 66-68 (1983)). The Bolger factors  
 26 are: (1) whether the speech is an advertisement; (2) the speech refers to a particular product,  
 27 and (3) the speaker has an economic motivation.

28

1       While unnecessary to the Court’s analysis in this case, the *Bolger* factors, here  
 2 strongly support REX’s claim that Zillow’s website display constitutes commercial speech.  
 3 Simply stated, Zillow’s listings satisfy all three of the *Bolger* factors because they are: (1)  
 4 are in “the traditional form of an advertisement,” with “price or availability information  
 5 listed”; (2) refer to specific products (properties for sale); and (3) Zillow has an economic  
 6 motivation to present its listings—earning millions in advertising revenue from the by buyer-  
 7 brokers whom it connects with homebuyers in its Premier agent and Premier Agent Flex  
 8 programs. *Ariix*, 985 F.3d at 1116-17.

9       The *Ariix* opinion explains further that the third factor is not limited to economic  
 10 motivation as a result of a direct commercial transaction with consumers. *Id.* at 1117. The  
 11 Ninth Circuit explained that, while “incidental economic benefit” (such as selling advertising  
 12 or increasing sales of the publication containing the false statement) may not suffice, the  
 13 economic motivation need not be an “expectation of a direct commercial transaction with  
 14 consumers.” *Ariix* at 1117 In this case, Zillow derives significant indirect benefits from the  
 15 promotion of MLS listings on its website by charging brokers and agents for advertising and  
 16 leads. Indeed, the more successful Zillow is in facilitating residential real estate transactions  
 17 by advertising houses and providing agents with leads, the more dollars agents spend for  
 18 visibility on Zillow’s website. In this case the false statements appear in Zillow’s new  
 19 website, which was designed to drive customers to the “Agent Listings” tab. Directing  
 20 consumers to “Agent Listings” benefits Zillow because those are the listings that generate  
 21 most commissions for buyer agents who in turn pay Zillow.

22           **B.     Zillow’s “User Tools” Argument Is Inapposite**

23       Zillow further attempts to divert the Court from the blatant falsity of the two-tab  
 24 display by arguing that the tabs and their labels are not “commercial speech” because they  
 25 are mere “user tools.” Mot. at 17. But Zillow’s tabs and their labels cannot be fairly  
 26 characterized as “user tools.” A user tool should help to navigate a website; instead, Zillow’s  
 27 tabs, labelled as they were, served to obscure REX’s listings and mischaracterized them as  
 28

1 “non-agent.” Zillow’s own documents show that it knew the new two-tab system impeded  
 2 (not helped) consumers in using the site.<sup>13</sup>

3       Zillow cites three cases to argue that the tabs are mere “user tools” not actionable  
 4 pursuant to the Lanham Act. None is on point. *Prager Univ. v. Google, LLC*, 951 F.3d  
 5 991 (9th Cir. 2020) and *Newman v. Google, LLC*, No. 20-CV-04011-LHK, 2021 WL  
 6 2633423, at \*11 (N.D. Cal. June 25, 2021), concerned YouTube’s designation of  
 7 plaintiffs’ video content as potentially inappropriate, and the alleged false statement was  
 8 that the content was not visible unless the viewer turned off Restricted Mode. In *Maffick*  
 9 *LLC v. Facebook, Inc.*, No. 20-CV-05222-JD, 2021 WL 1893074, at \*4 (N.D. Cal. May  
 10 11, 2021), the plaintiff complained that Facebook had flagged its social media content as  
 11 “Russia state-controlled media.” All three cases were dismissed for failure to state a  
 12 claim because the statements at issue were unconnected to identifiable commercial  
 13 transactions. See *Newman*, 2021 WL 2633423, at \*11 (N.D. Cal. June 25, 2021)  
 14 (“Defendants’ statements regarding Restricted Mode’s “terms of service, community  
 15 guidelines, and contracts are not advertisements or a promotional campaign,” but rather  
 16 simply explain to YouTube users the nature of the Restricted Mode tool.”) (quoting  
 17 *Prager Univ. v. Google LLC*, 951 F.3d 991, 1000 (9th Cir. 2020)). In *Maffick*, “neither  
 18 the label nor Facebook’s ‘campaign’ around it constituted an advertisement or promotion  
 19 . . . .” *Maffick LLC*, 2021 WL 1893074, at \*4 (emphasis added).

20       Here, Zillow’s tabs appear in a website that clearly constitutes commercial speech  
 21 and the mislabeling could not be more explicit. Therefore, the Court should reject Zillow’s  
 22 “mere user tools” argument.

23           **C. The Record Contains Substantial Evidence That Zillow’s False New  
 24 Display Injured REX**

25       Zillow next tries to persuade the Court to focus myopically on the “Other Listings”  
 26 label and dismiss REX’s claim because REX cannot prove that the “Other Listings” label  
 27

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28 <sup>13</sup> Ex. NNN, ZG\_00298006; Ex. OOO, ZG\_00429309 at 313; Ex. PPP, ZG\_00102105; Ex.  
 QQQ, ZG\_00001161 at 168, 219, 221.

proximately caused its business to fail. Mot. at 18. But REX is not claiming harm from the assignment of its listings to the “Other Listings” Tab. Rather, REX claims that Zillow violated the Lanham Act by making at least two literally false statements that operate inseparably with each other and in combination with the display as a whole to deceive consumers: (i) the label “Agent Listings” is literally false because it does not include REX’s agent listings; (ii) the tab “Other Listings,” juxtaposed as it is to the Agent Listings tab, is literally false because it consists of non-agent listings yet includes REX agent listings; and (iii) the listings display to which the website defaults is misleading and reinforces the falsity of the labels on the two tabs.

Pursuant to settled law, whether these facts harmed REX should be judged by traditional proximate cause principles. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 138, (2014) (plaintiff ordinarily “must show economic or reputational injury flowing directly from the deception wrought by the defendant’s advertising.”). The jury could reasonably find from the record evidence that REX’s damages flow from the display as a whole, as REX claims. Zillow’s own documents and testimony, as well as REX’s business records, show that when the website went live in January 2021, it had an immediate negative impact on listings assigned to the “Other Listings” tab. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].<sup>14</sup> An analysis of Zillow’s data found the display change was accompanied by a 64.6 percent reduction in page views of REX’s listings, and caused 60.2% drop in REX closings in 2021 and 75.5% drop in 2022. Evans ¶¶ 416, 423. These facts are powerful evidence of harm to REX traceable directly to Zillow’s newly configured display.

Moreover, to the extent REX is claiming the representations on the two-tab display are literally false, REX does not have the initial burden of demonstrating harm. In the Ninth Circuit, if REX proves literal falsity, REX is entitled to a presumption of injury and

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<sup>14</sup> Ex. RRR, ZG\_00298006; Ex. SSS, Thomas Dep. 98:3-7.

1 entitlement to monetary relief. *See Southland Sod Farms.*, 108 F.3d at 1146 ; *see also*  
 2 *Chaverri v. Platinum LED Lights LLC*, No. CV-21-01700-PHX-SPL, 2022 WL 2275664, at  
 3 \*4 (D. Ariz. June 22, 2022).

4 **D. REX’s Lanham Act Damages Are REX’s Lost Future Profits**

5 Because REX failed as a direct result of a violation of the Sherman Act, Dr. Evans,  
 6 REX’s liability and damages expert, will testify that the appropriate measure of damages for  
 7 its antitrust claims is the value of REX’s business (minus any residual value). In addition,  
 8 Dr. Evans states: “My understanding is that REX claims, and intends to prove at trial, that  
 9 Zillow’s two-tab display violated the Lanham Act and the analogous state consumer  
 10 protection act, in which case the damage estimates reported in this section equal REX’s  
 11 damage estimates under these claims as well.” Evans ¶ 485 n.473. Dr. Evans’ understanding  
 12 is correct: REX’s legal position is that it failed due to the two-tab display and, provided the  
 13 jury finds that the two-tab display violated the Lanham Act and caused REX to go out of  
 14 business, then the measure of REX’s damages is the same regardless of whether the jury  
 15 finds liability under the antitrust laws the Lanham Act or both, though unlike Sherman Act  
 16 damages, Lanham Act damages are not trebled, but can be enhanced up to three times actual  
 17 damages. *See* 15 U.S.C. § 1117(a).

18 Contrary to Zillow’s characterization, there is nothing esoteric about Dr. Evans’  
 19 reliance on the present value of REX’s future lost profits as the appropriate measure of  
 20 damages for REX’s Lanham Act claim. It is allowed by the very terms of the statute. 15  
 21 U.S.C. § 1117 (allowing for recovery of “(1) defendant’s profits, [or] (2) any damages  
 22 sustained by the plaintiff” for violations of 15 U.S.C. § 1125(a)); *see also POM Wonderful*  
*LLC v. Purely Juice, Inc.*, No. CV-07-02633CAS(JWJX), 2008 WL 4222045, at \*14 (C.D.  
 24 Cal. July 17, 2008), *aff’d*, 362 F. App’x 577 (9th Cir. 2009) (“the Court finds that plaintiff  
 25 is entitled to recover lost profits on sales it would have made, but for defendants’ false  
 26 advertising”). Zillow claims (at 20) without citation to authority that “future profits do not  
 27 represent actual lost profits,” but, of course, lost profits are always future profits. *See, e.g.*,  
*St. Louis Sw. Ry. Co. v. Dickerson*, 470 U.S. 409, 412 (1985) (“damages awards in suits

1 governed by federal law should be based on present value” and stating “no single method  
 2 for determining present value is mandated by federal law”); *JTH Tax, Inc. v. H & R Block*  
 3 *E. Tax Servs., Inc.*, 245 F. Supp. 2d 756, 758 (E.D. Va. 2002) (noting “requirement to  
 4 discount the future profits award to present value” in Lanham Act claim).

5 Like its argument regarding proximate causation, Zillow also seeks summary  
 6 judgment because Dr. Evans does not disaggregate the damages attributable to the falsity of  
 7 the “Other Listings” tab from other factors that could have contributed to REX’s failure.  
 8 Neither of the cases cited by Zillow holds that disaggregation is required. In  
 9 *Trafficschool.com, Inc. v. EDriver, Inc.*, 653 F.3d 820 (9th Cir. 2011) the Ninth Circuit  
 10 affirmed the district court’s decision denying monetary relief after a bench trial based on the  
 11 district court’s finding that the plaintiff produced no evidence of causation. Likewise, the  
 12 court in *Cascade Yarns, Inc. v. Knitting Fever, Inc.*, 905 F. Supp. 2d 1235 (W.D. Wash.  
 13 2012) rejected plaintiff’s false advertising claim on multiple grounds after a bench trial,  
 14 including plaintiff’s failure to produce competent evidence of a causal link between the  
 15 alleged falsity and damages. Here, the record contains evidence of a causal link between the  
 16 falsity of the two-tab display and REX’s failure. To the extent there is a dispute on this point  
 17 it should be resolved at trial.

18 **E. Damages Need Not Be Limited to Monetary Damages**

19 Even if the jury were to find Zillow’s Lanham Act violation did not drive REX out  
 20 of business, REX would still be entitled to nominal damages. *See Pogrebnoy v. Russian*  
*Newspaper Distrib., Inc.*, 289 F. Supp. 3d 1061, 1072–73 (C.D. Cal. 2017) (awarding  
 21 nominal damages for Lanham Act claim violation). The Amended Complaint includes an  
 22 adequate prayer for nominal damages, as it requests the Court to “[a]ward REX damages  
 23 and statutory damages to be proven at trial,” and in connection with the request for a  
 24 permanent injunction, to “[o]rder and award all other relief to REX as the Court deems just  
 25 and proper.” Am. Compl., Prayer for Relief, ¶¶ J(f), F. *See Yniguez v. State*, 975 F.2d 646,  
 26 647 n.1 (9th Cir. 1992) (“Although the plaintiff’s complaint does not expressly request  
 27

nominal damages, it did request ‘all other relief that the Court deems just and proper under the circumstances.’ That is sufficient to permit the plaintiff to pursue nominal damages.”).

REX would also be entitled to attorney’s fees. *See* 15 U.S.C. § 1117(a) (“The court in exceptional cases may award reasonable attorney fees to the prevailing party.”); *Earthquake Sound Corp. v. Bumper Indus.*, 352 F.3d 1210, 1212, 1216–18, 1221 (9th Cir. 2003) (affirming award of attorney’s fees to plaintiff where defendant violated Lanham Act).

#### V. Zillow’s Motion for Summary Judgment on Rex’s State Law Claims Should Be Denied

##### A. Summary Judgment Should be Denied as to REX’s False Advertising Claim Pursuant to RCW 19.86.20

Washington courts hold that claims under the Washington CPA, 19.86.020, are generally congruent with claims under the Lanham Act. *See, e.g., Campagnolo S.r.L. v. Full Speed Ahead, Inc.*, No. C08-1372 RSM, 2010 WL 1903431, at \*11 (W.D. Wash. May 11, 2010) (denying defendant’s motion for summary judgment); *CertainTeed Corp. v. Seattle Roof Brokers*, No. C 09-563 RAJ, 2010 WL 2640083, at \*7 (W.D. Wash. June 28, 2010) (“For the remainder of this order, the court will consider proof of a Lanham Act false advertising claim sufficient to prove a CPA violation as well. . . . [S]tatements that would violate the Lanham Act but for their use in purely local commerce will also be deemed violations of the CPA”).

Accordingly, the Court should allow REX’s claim (Court IV) under the Washington Consumer Protection Act to proceed to trial because there are questions of fact as elements of the claim and REX will be able to produce sufficient evidence that a jury could find in favor of REX.

##### B. Summary Judgment Should be Denied as to REX’s Antitrust Claim Pursuant to RCW 19.86.030

REX’s antitrust claim, (Count VI, pursuant to RCW 19.86.030 also should proceed to trial for the same reasons stated above regarding its federal antitrust claims, given their similarities. *See State v. Black*, 100 Wash. 2d 793, 799, 676 P.2d 963, 967 (1984) (“When the Legislature enacted the Consumer Protection Act, it anticipated that

our courts would be guided by the interpretation given by federal courts to their corresponding federal statutes.”); *Murray Pub. Co. v. Malmquist*, 66 Wash. App. 318, 324, 832 P.2d 493, 497 (1992) (“RCW 19.86.030 is essentially identical to section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. In construing RCW 19.86.030, courts are to be guided by federal decisions interpreting comparable federal provisions.”) (internal citation omitted).

**C. REX at a Minimum Is Entitled to Nominal Damages on Its Defamation Claim**

As explained above, REX alleged and has shown that the two-tab display was literally false and REX has produced additional evidence that the display was misleading in other respects. REX also has pointed to evidence demonstrating that Zillow knew the two-tab display was false and misleading because Zillow knew REX's agents were Premier Agents on Zillow's websites. This suffices to establish a *prima facie* case of defamation under Washington common law. *See Gertz v. Robert Welch, Inc.* 418 U.S. 323, 349 (1974) (common law of defamation allows for recovery without evidence of actual loss, but only where plaintiffs prove knowledge of falsity or reckless disregard for the truth). Therefore, REX is minimally entitled to seek nominal damages for Zillow's wrongful conduct. *See Hupp v. Jones*, 474 Fed. App'x 601, 601–02 (9th Cir. 2012) (affirming district court's award of nominal damages in defamation claim).

## CONCLUSION

For the foregoing reasons, REX respectfully requests that the Court deny Zillow's motion for summary judgment.

**Word Count:** I certify that this memorandum contains 8,400 words, in compliance with the Local Civil Rules.

1 Dated: June 27, 2023

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**CERTIFICATE OF SERVICE**

23 **I HEREBY CERTIFY** that on June 27, 2023, I served foregoing document to be  
24 filed in this Court's CM/ECF system, which will send notification of such filing to the  
25 counsel of record.

26  
27 By: /s/ Carl E. Goldfarb

28 Carl E. Goldfarb, Esq.